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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1967

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WILL RAY HENRY,

PETITIONER,

VS.

DELHI-TAYLOR OIL CORPORATION,

RESPONDENT.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

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# PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR PETITIONER

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# REPLY FOR WILL RAY HENRY TO RESPONDENT'S BRIEF IN OPPOSITION

## OPINION BELOW

The Judgment of the Supreme Court of Texas is reported in 416 SW2nd 390.

## JURISDICTION

The jurisdiction of the Supreme Court of the United

establishing that Delhi-Taylor had failed to take those reasonable precautions and such was negligence and a proximate cause of the injuries suffered by Petitioner.

No issues were requested by Petitioner in regard to adequate warning of the existance of this dangerous condition. Furthermore, no such issues were suggested or demanded by the Respondent-Defendant, Delhi-Taylor. Additionally, although provision is made in the Texas Rules of Civil Procedure, Rule 279, for either party to demand that the Trial Court make findings on unsubmitted Special Issues, no findings were requested by Petitioner nor demanded by the Respondent.

Therefore, at that point Petitioner had prevailed in establishing that Delhi-Taylor had breached its duty to Petitioner. The reason why the issue or issues on the question of adequate warning were not requested or findings requested or demanded by either party simply begs the question. Regardless of the reason, that portion of the theory of recovery was not submitted; such issues were not requested and no findings requested or found.

Under the provisions of the Texas Rules of Civil Procedure, Rule 279, just such a situation is comtemplated.

> "When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory

partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection ot such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issues or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Therefore under the abundantly clear provisions of the Texas Supreme Court's own Rules of Procedure, if the issue of warning to Petitioner's employer was necessary to complete the submission of Petitioner's theory of recovery and such issue was not submitted, as it clearly was not, then under the above provisions of Rule 279, that issue must be deemed as found in support of the judgment. Herein lies the error of the Texas Supreme Court which is the foundation of the denial of due process of law complained of by Petitioner in his Application for Writ of Certiorari.

Again Petitioner does not here complain of the Texas Supreme Court's decision to overrule the Reinle Case; nor is it Petitioner's complaint that the rule of law has been declared to be that an "adequate warning" to the employee's employer will satisfy the duty owed by the owner-occupier to the employee. It is Petitioner's singular complaint that in order to use this case as a vehicle to declare this change in the law, the Texas Supreme Court has been required to blatantly refuse to recognize and apply their very own established rule of procedure. Petitioner is well aware that this Court will not require any particular mode of procedure of the States, so long as the basic right to a hearing are made available, and Petitioner does not request this Court do so here. However, it is just as well established that this Court

will not condone the denial of any procedural safe guards that are established and held out to be the procedure that will be used. This is exactly what the Texas Supreme Court has done, refused to even recognize much less apply, its own rules of civil procedure. The Texas Supreme Court has, as a practical result, prohibited Petitioner from having his day in Court and thereby has denied Petitioner his right of due process of law.

The Galveston-Houston Electric Ry Co. vs. Reinle 113, Tex. 456, 258 SW2nd 803 (1924), decision, at the time the present case was tried, was the Texas Supreme Court's latest announcement that warning to the employer-independent-contractor or knowledge of the dangerous condition by the independent-contractor was not sufficient to satisfy the duty owed to the employee of the independent-contractor by the owner-occupier. Again, Petitioner does not challenge the Texas Supreme Court's authority to overrule prior decisions. However, since this was the highest court's most recent announcement on the point of law directly in point with the Petitioner's theory of recovery and since it was never contended that the employee himself was ever warned, how can it be required of the Petitioner that he anticipate that the high court will choose this particular fact situation to announce a diametrically opposite position to that which has stood for some forty years? It might well be

that good jurisprudence requires that Petitioner be required to obtain a jury finding that Delhi-Taylor breached its duty to warn which could be satisfied by adequate warning to the independent-contractor-employer, as announced in the Texas Supreme Court's decision, but there was no such requirement at the time the case was tried to the jury. The only possible question of warning that could have been required to be established was a direct warning to the employee. No one at any time ever plead or attempted to established that the employee himself was warned. To the contrary, by the high court's latest decision, directly on the question, it is clear that even if the employer was warned by the owner-occupier of the dangerous condition, this would not be sufficient to satisfy the duty to warn the employee. Galveston-Houston Electric Ry Co. vs. Reinle, id.

The Supreme Court, in order to accomplish what it has accomplished in this decision, was required to ignore and blatantly refuse to apply Rule 279, Texas Rules of Civil Procedure and furthermore to assume the position of a fact finding body when it declared that the "evidence conclusively establishes . . . that the duty was not breached." Rule 279, was discussed above.

How can a point, that the Court has just announced to be of such supreme importance be said to be "conclusively

established" when not one shread of evidence was developed on this specific point and further no issue or issues were requested nor findings made on this point? It is inconceivable to this writer how this attitude, displayed by the Texas Supreme Court, can be anything other than a denial of basic and fundemental jurisprudential thought processes that have clearly denied Petitioner the right to be heard and thus denied to him his right of due process of law.

Petitioner respectfully requests that his Application for Writ of Certiorari be granted.

2. REPLY TO RESPONDENT'S POSITION THAT PETITIONER HAS FAILED TO COMPLY WITH THE PROVISIONS OF 28 USC, ART. 2101 (C) IN THE FILING OF THIS PETITION FOR WRIT OF CERTIORARI.

Petitioner is well aware of the policy of this Court in regard to the time for filing an Application for Writ of Certiorari. If there was any doubt previously, there is none now. Furthermore, Petitioner confesses that he was in error in the calculation of the actual dates upon which the Application and accompanying instruments were required to be filed. It must be pointed out that within the erroneously appointed deadline, October 12, 1967, the Application and all other necessary papers were filed. Furthermore, the docket will reflect that prior to this erroneous deadline, Petitioner filed with the Court a Motion for Extension of Time within

which to file the Application. Contrary to what the Attorney for Respondent would have the Court believe, Respondent was notified that the request was going to be made and specifically requested that it not be indicated that he was agreeing to the request for extension of time but that he had no objection. The purpose for the request for extension of time was to insure that the Transcript of the proceedings in the Texas Supreme Court would have sufficient time to be transported by the mails and was requested at the suggestion of the Clerk of the Court for which Respondent is grateful. The Court's attention is respectfully directed to such Motion for the purpose of observing that even in that instrument Petitioner was under the mistaken impression that the filing deadline was October 12, 1967,

Subsequently it was brought to the Court's attention and to the petitioner's attention that the application had been filed beyond the 90 day time period. At this point Petitioner first became aware of the error in calculating the time period. The following is offered for the purpose of explanation and not excuse. The calculation of the 90 day period was figured from the date reported in the Southwestern Reporter, 416 390 SW2nd. The date therein indicated as the date when the Petitioner's Motion for Rehearing was denied by that Court. The date given there was July 14, 1967. In fact the action of the Supreme Court in denying that Motion for Rehearing was taken on

July 12, 1967. Using the July 14th date, the 90 day period for filing the Petitioner's Application for Writ of Certiorari, lapsed on October 12, 1967, and figuring from the July 12th date, the deadline was October 10, 1967.

Petitioner respectfully requests the Court take into consideration that within recent times there apparently has developed a narrow exception where the Court has disregarded the time limit prescribed for filing petition for certiorari. Petitioner does not seek to expand this exception, but would request the Court accept this petition as being within the existing exception.

In the case of Banks vs. California, 1966, 86, S. Ct. 622, 388 US 420, 15 L Ed 2nd 499, the petition for certiorari was not received until April 13th. The date upon which the petition was due to be filed was April 9th. Here the documents contained in the petition indicated that the petitioner had executed them on April 16th and the delay came between that date and the time when the petition was actually mailed. The Court granted certiorari and vacated the judgment below with direction for further proceedings.

Another similar case was Smith vs. Mississippi, 1963, 83 S. Ct. 1265, 373 US 238, 10 L Ed 2nd 321. In Arnold vs. North Carolina - 1964, 84 US 1038, 376 US 773, 12 L Ed 2nd 77, the petition was filed after the 90 day period had expired. There was no extension of time obtained nor even requested.

Furthermore, there was no excuse or extenuating circumstances offered by the Petitioner. Here the Court again determined to disregard the untimely filing and granted certiorari and vacated the judgment below. The Court's decision pointed out that the petition was ffled within the period of time it could have been extended even though such extension was not requested nor obtained.

The above cases of course are criminal matters. Nevertheless petitioner cites them in support of his request that the Court waive or disregard the late filing of his Petition for Certiorari. Petitioner's liberties and rights to his contitutional guarantees have no less been infringed upon by the fact that this is a civil matter instead of a criminal matter. There is no distinction made in the constitution of the United States which makes one guarantee more important than the others. To the contrary, when such rights are violated, as they so clearly have been in the instant case, it can make no difference what fundamental right has been denied, if fundamental and if denied then it must be corrected.

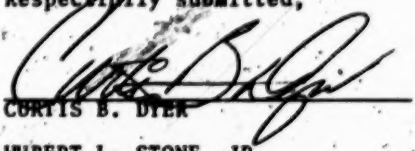
Recognizing the importance of the Court's policy in establishing deadlines, and the importance that at some point litigation must be ended, Petitioner respectfully and humbly implores the Court to disregard the technical error and consider the Application for Writ of Certiorari upon it's merits.

Furthermore that upon such consideration Petitioner's Application be in all things granted.

## CONCLUSION

WHEREFORE, Petitioner respectfully prays the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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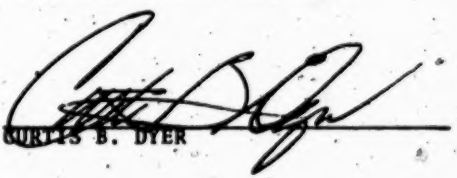
## CERTIFICATE OF SERVICE

A copy of the foregoing brief, has been served on Mr. William H. Keys, Keys, Russell, Watson and Seaman, 18th Floor Driscoll Building, Corpus Christi, Texas, Attorneys for Respondent.



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